No. 76-234

In the Supreme Court of the United States

OCTOBER TERM, 1976

BOYD JAMES O'DONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 539 F. 2d 1233.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1976. The petition for a writ of certiorari was filed on August 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inquiry conducted by the district court before accepting petitioner's plea of guilty satisfied the requirements of Rule 11, Fed. R. Crim. P.

2. Whether the court of appeals erred in concluding that petitioner's plea of guilty precluded review of the

denial of his motion to dismiss the indictment for pre-indictment delay and lack of a speedy trial.

STATEMENT

An indictment filed on January 9, 1975, in the United States District Court for the District of Arizona charged petitioner with 31 counts of making a false oath in relation to bankruptcy proceedings, in violation of 18 U.S.C. 152. On November 18, 1975, following an unsuccessful motion to dismiss the indictment for denial of his right to a speedy trial and for pre-indictment delay, petitioner requested permission to withdraw his plea of not guilty and to enter a guilty plea to one count of the indictment (Count XI).

Before accepting the plea, the district court conducted an inquiry as required by Rule 11, Fed. R. Crim. P. At the outset petitioner expressed his awareness of the maximum punishment upon conviction (Tr. 19-20). Government counsel then disclosed to the court the terms of a plea bargain, providing for dismissal of the remaining counts at sentencing, dismissal of related charges filed against petitioner's wife, and no recommendation by the government with regard to the sentence to be imposed (Tr. 20). Petitioner told the court that he understood and agreed with the terms of the bargain as related by the Assistant United States Attorney (Tr. 20-21) and that he and his counsel had discussed and investigated the matter thoroughly, with full awareness of the facts of the case (Tr. 21-22). Petitioner's attorney stated that he concurred in the decision to enter a plea of guilty (Tr. 22).

Petitioner informed the court that he was 58 years old, had a college education, had prior courtroom experience, and understood the nature of the proceedings (Tr. 22-23). The court advised petitioner that by pleading guilty

he would waive certain constitutional rights, including trial by jury, the presumption of innocence, the requirement that the government prove his guilt beyond a reasonable doubt, the right to summon and cross-examine witnesses, and the privilege against self-incrimination. Petitioner replied that he understood these consequences but that he nonetheless desired to plead guilty because he was guilty of the offense charged (Tr. 23-24).

The court then read Count XI, which in essence charged that on March 13, 1970, petitioner had knowingly and fraudulently made a false oath as to material matters in relation to his own bankruptcy proceeding, by filing with the clerk of the district court a bankruptcy petition containing a false representation that petitioner was employed as a salesman for the United International Corporation. The following colloquy ensued between the court and petitioner (Tr. 25-26):

[Q.] Generally, are those facts true?

A. Yes, they are.

Q. Did you file the particular petition involved here?

A. Yes, I did.

Q. And did you state therein that you were employed as a salesman for United International?

A. Yes, I did.

Q. And was that true or false?

A. That was false.

In light of these responses, the court agreed to accept the plea of guilty. On December 8, 1975, petitioner was sentenced to three years' imprisonment and the remaining charges against him and his wife were dismissed. The court of appeals affirmed (Pet. App. A),

rejecting petitioner's attack upon the adequacy of the Rule 11 proceedings and his attempt to relitigate his speedy trial and pre-indictment delay claims.

ARGUMENT

1. Petitioner contends (Pet. 9-12) that the district court's inquiry failed to satisfy the requirements of Rule 11, Fed. R. Crim. P., because the court failed to set forth the elements of the offense, to place petitioner under oath during the proceedings, or to make an adequate determination that a factual basis existed for the plea. In addition, petitioner alleges that the court erred in allowing government counsel to recite the maximum penalty for the offense and to ask petitioner whether he understood the extent of the penalty. The court of appeals correctly rejected these claims, however, for the record shows that petitioner entered his plea of guilty voluntarily, with a full understanding of the charges against him and of the consequences of his plea, and that there was a factual basis for the plea. In any event, petitioner's contentions concern the proper interpretation of a version of Rule 11 that has since been repealed and, accordingly, they do not warrant further review.[1]

At the time of petitioner's guilty plea, Rule 11 provided that the court "shall not accept such plea * * * without first addressing the defendant personally and determining

[1]Effective December 1, 1975, Rule 11 has been amended to require the court to address the defendant personally with regard to the maximum possible penalty provided by law (Rule 11(c)(1)). In addition, Rule 11(c)(5) states that a defendant must be warned that the answers he gives to the court's questions about the offense, if under oath, may subject him to a prosecution for perjury or false statement. As petitioner recognizes (Pet. 11), these amendments were not in effect on the date of his plea.

that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. * * * The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." The record reflects that there was adequate compliance with those requirements in this case. Petitioner, who was represented by counsel, was questioned at length by the court, and his unequivocal responses leave no doubt that his guilty plea was knowingly and voluntarily entered. Although, as petitioner contends, the court's thorough inquiry was preceded by government counsel's statement of the maximum penalty for the offense and by petitioner's express admission that he was aware of that penalty, nothing in Rule 11 as it read prior to the recent amendments prohibited such preliminary questioning by the prosecutor or others. See *United States* v. *Yazbeck*, 524 F. 2d 641, 643 (C.A. 1); *Limon-Gonzalez* v. *United States*, 499 F. 2d 936, 937, n. 2 (C.A. 5); *Davis* v. *United States*, 470 F. 2d 1128, 1130-1132 (C.A. 3); *United States* v. *Mileto*, 434 F. 2d 251, 252 (C.A. 2). Rule 11 is designed to create a record to demonstrate the voluntariness of a plea of guilty (*McCarthy* v. *United States*, 394 U.S. 459, 467), and therefore the essential concern is not that the court ask all of the questions but that "the record leave no doubt that the defendant heard and understood what was said." *United States* v. *Yazbeck*, *supra*, 524 F. 2d at 643. In any event, the district court specifically asked petitioner whether he "understood the penalties that the Court could impose, as just explained to you by [the

Assistant United States Attorney]," and petitioner said "Yes, I do" (Tr. 24).[2]

Furthermore, contrary to petitioner's contentions (Pet. 10), there was no requirement under the old Rule 11 that a defendant be questioned under oath.[3] Finally, petitioner's responses clearly established that there was a factual basis for his plea, since he admitted to each of the allegations in the indictment, including the charge that he "knowingly and fraudulently" made a false material representation during the bankruptcy proceeding concerning his employment. It is sufficient under Rule 11 if "the inquiry made * * * was factually precise enough and sufficiently specific to develop that [petitioner's] conduct on the [occasion] involved was within the ambit of that defined as criminal." *Jimenez* v. *United States*,

[2]By contrast, in *United States* v. *Crook*, 526 F. 2d 708 (C.A. 5), the court questioned the defendant only as to his participation in the offense, while permitting government counsel to inquire broadly of the defendant whether the plea of guilty was voluntary. While we disagree with the result in *Crook*, which seems unnecessarily technical, that case is therefore clearly distinguishable. Similarly, in *United States* v. *Yazbeck*, *supra*, the court recognized that the trial judge may rely on others to state the statutory punishment or to conduct portions of the required examination, but reversed the conviction because the record was not clear as to whether the defendant had heard and understood government counsel's statement of the maximum penalty.

[3]Exercising its supervisory authority, one circuit has ordered that a defendant wishing to enter a guilty plea be questioned under oath, in order to preclude later attacks on the representations made during the Rule 11 inquiry. *Bryan* v. *United States*, 492 F. 2d 775, 781 (C.A. 5), certiorari denied, 419 U.S. 1079. That court has held, however, that the failure to place the defendant under oath does not entitle him to vacate his plea of guilty absent a showing of prejudice. *United States* v. *Maggio*, 514 F. 2d 80, 91-92 (C.A. 5), certiorari denied, 423 U.S. 1032.

487 F. 2d 212, 213 (C.A. 5), certiorari denied, 416 U.S. 916. See *Bachner* v. *United States*, 517 F. 2d 589, 593 (C.A. 7).

2. Petitioner contends (Pet. 6-9) that the court of appeals erred in concluding that his guilty plea precluded review of the claim that he was prejudiced by pre-indictment delay and by denial of a speedy trial. But it has long been held that a plea of guilty waives such defects. See *Speed* v. *United States*, 518 F. 2d 75 (C.A. 8), certiorari denied *sub nom. Camp* v. *United States*, 423 U.S. 988; *United States* v. *Lee*, 500 F. 2d 586 (C.A. 8), certiorari denied, 419 U.S. 1003; *Karcher* v. *Wainwright*, 476 F. 2d 179 (C.A. 5); *United States* v. *Mann*, 451 F. 2d 346 (C.A. 2); *Fowler* v. *United States*, 391 F. 2d 276 (C.A. 5); *United States* v. *Doyle*, 348 F. 2d 715 (C.A. 2), certiorari denied, 382 U.S. 843.

Menna v. *New York*, 423 U.S. 61, does not require a different result. In *Menna*, the Court held that a plea of guilty did not prevent appellate consideration of defendant's claim that his prosecution was barred by double jeopardy, noting (*id.* at 63, n. 2):

> A guilty plea * * * simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

Unlike the Double Jeopardy Clause, whose protections are "distinctive," *Blackledge* v. *Perry*, 417 U.S. 21, 31, the right to be indicted and tried expeditiously is designed in large part to limit the possibility that a defendant's defense will be impaired through loss of memories or the death or disappearance of witnesses.

Barker v. *Wingo*, 407 U.S. 514, 532; *United States* v. *Marion*, 404 U.S. 307, 324. By freely and voluntarily pleading guilty, however, petitioner had admitted the truth of the charges in the indictment, has ensured that his factual guilt was properly established, and has conceded that his conviction was not unfairly procured by the passage of time. Thus, as the court of appeals correctly held (Pet. App. 7-8), petitioner's Fifth and Sixth Amendment claims are not logically inconsistent with the valid establishment of guilt. Hence, they were waived by his plea of guilty.[4]

Other reasons also suggest that petitioner's arguments have little to recommend them. As noted above, proof of prejudice is an essential ingredient of a successful claim of pre-indictment or pretrial delay, and such proof is generally unavailable before the trial itself. See *Barker* v. *Wingo*, *supra*, 407 U.S. at 530-532. Since petitioner's voluntary plea of guilty eliminated a trial,

[4]Petitioner could have foregone a full-dress trial yet preserved his pre-indictment delay and speedy trial claims for appeal either by stipulating to the essential facts (see *United States* v. *Mendoza*, 491 F. 2d 534, 537-538 (C.A. 5)), or by attempting to enter a plea of guilty with a reservation, a procedure that has been approved by some courts of appeals when consented to by the government and the trial judge. See *United States* v. *Brown*, 499 F. 2d 829, 831-832 (C.A. 7), certiorari denied, 419 U.S. 1047; *United States* v. *Rothberg*, 480 F. 2d 534, 535 (C.A. 2), certiorari denied, 414 U.S. 856. Under the circumstances here, however, it would be inequitable to allow petitioner to raise his substantive legal claims on appeal after pleading guilty pursuant to a plea bargain that led to the dismissal of 30 of the 31 counts against him, since the government agreed to the plea in the belief that it would terminate the proceedings against petitioner. Moreover, the fact that petitioner did not seek to preserve his appeal rights at the time of entry of his plea strongly suggests that his appeal is a product of dissatisfaction with his sentence.

it thus prevented the compilation of an adequate evidentiary record for an appellate court to consider in reviewing his claims. Therefore, just as a defendant who fails to present these Fifth and Sixth Amendment arguments prior to trial may not raise them on appeal (see Fed. R. Crim. P. 12(b); *Fleming* v. *United States*, 378 F. 2d 502, 504 (C.A. 1); cf. *Davis* v. *United States*, 411 U.S. 233), petitioner's guilty plea effectively precluded further review of the denial of his pretrial motions and constituted a waiver of those claims. See *Tollett* v. *Henderson*, 411 U.S. 258, 267.[5]

[5]In any event, the record clearly shows that the district court properly denied petitioner's motions to dismiss. This prosecution arose out of petitioner's bankruptcy proceedings, which were still pending on appeal on the eve of trial. The Federal Bureau of Investigation began its extensive investigation of this case in 1971, and during the next three years it submitted over 300 pages of reports to the United States Attorney, who also had to examine more than 2,000 pages of transcripts and nearly 200 exhibits. See Tr. 4-5. An indictment was filed on May 30, 1974, and a superseding indictment was filed on January 9, 1975. On January 30, 1975, a trial date in November 1975 was scheduled. However, not until late October 1975, three weeks before trial, did petitioner file a motion to dismiss the indictment on speedy trial grounds. Furthermore, his claim of prejudice concerned the death or incapacitation of witnesses who were not mentioned and had not testified in the first round of bankruptcy proceedings and who certainly were irrelevant to the count on which petitioner pleaded guilty. Moreover, petitioner did not allege, much less prove, that the delays were attributable to a decision by the government to prejudice his defense. In these circumstances, the district court, following a hearing, properly denied petitioner's speedy trial and pre-indictment delay claims.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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